

STATE OF MICHIGAN
COURT OF APPEALS

MILTON BARDEN, JR.,

Petitioner-Appellee,

v

SECRETARY OF STATE,

Respondent-Appellant.

UNPUBLISHED

September 14, 2001

No. 221609

Wayne Circuit Court

LC No. 99-907527-AL

Before: Jansen, P.J., and Collins and Cooper, JJ.

PER CURIAM.

Respondent appeals by leave granted from a circuit court order that reversed the decision of the Driver's License Appeal Division (DLAD), and restored petitioner's driver's license. We reverse the circuit court's order and reinstate the administrative decision.

Petitioner was convicted of the following three alcohol-related driving offenses within a ten-year period: (1) operating while impaired by liquor on November 3, 1989, (2) unlawful bodily alcohol content on September 10, 1991, and (3) unlawful bodily alcohol content on December 12, 1996. After the third conviction, petitioner's driver's license was revoked for a minimum of one year beginning on December 12, 1996, under the mandatory habitual violator provision of the Michigan Vehicle Code. MCL 257.303(2)(f).¹

Petitioner became eligible for reinstatement of his driver's license on December 11, 1997. A petition was filed that resulted in denial for another year, with eligibility for review on December 23, 1998. The current action arises out of petitioner's second petition for review that led to a January 4, 1999, administrative hearing before respondent. Petitioner appeared at the hearing and provided a current substance abuse evaluation, letters from acquaintances and family members attesting to petitioner's abstinence from alcohol, and Alcoholics Anonymous (AA) attendance sheets. Further, petitioner testified that he had not consumed alcohol in approximately twenty months, and that he attended AA meetings two or three times a week. The attendance sheets showed that he had attended from February to December 1998, usually four or

¹ The statute has undergone revisions since the time of the administrative hearing and we will refer to the most current subsections in this opinion.

five times a month. The letters submitted to the hearing officer also attested to sobriety for a year or more.

Additionally, the substance abuse evaluation stated that petitioner met the criteria for alcohol dependence, but the evaluation also stated that petitioner's alcohol dependence was in full remission. The evaluation stated that petitioner's prognosis was good based on the length of his sobriety, his participation in AA, his successful completion of various hospital treatments, and his desire and motivation for continued sobriety. The evaluation also noted that petitioner had a previous episode of relapse after maintaining sobriety on his own for approximately one year in 1993, but petitioner did not display evidence that was indicative of relapse behavior at the time of the interview. Overall, the evaluation gave petitioner a good prognosis provided he continued his involvement with AA and continued to abstain from alcohol. However, when questioned by the hearing officer, petitioner could not recite any of AA's twelve steps of recovery. Additionally, the evaluation indicated that petitioner drank to the point of alcohol poisoning in April 1997.

In a written order dated January 5, 1999, the hearing officer denied petitioner's application for reinstatement of his license finding that petitioner:

failed to establish by clear and convincing evidence that their [sic] substance abuse problem is under control and likely to remain under control. Petitioner is alcohol dependent and has a history of relapsing after one year of abstinence. Petitioner is recommended to attend AA meetings regularly but could not document regular AA attendance and he could not verbalize any of the AA principles to recovery. Petitioner admits to drinking on a daily basis for thirty years and having had an alcohol poisoning episode last year.

Petitioner appealed the decision to the circuit court. The circuit court reversed the decision of the DLAD and ordered petitioner's license to be restored in full. That order followed the circuit court's determination that it was not limited on appeal to a review of the administrative record, and after considering all of the evidence presented, the circuit court found that the DLAD hearing officer's determination was not supported by material, competent, and substantial evidence and was arbitrary, capricious, and an unwarranted exercise of discretion.

Respondent first argues that the circuit court erred when it considered evidence presented on appeal to the circuit court that was not presented to the hearing officer.

Under MCL 257.323(6), the circuit court *shall* confine its consideration of the DLAD's determination to a review of the administrative record. "The use of the word 'shall' in a statute connotes a mandatory duty or requirement." *Depyper v Safeco Ins Co of America*, 232 Mich App 433, 438; 591 NW2d 344 (1998). Under the clear and unambiguous terms of the statute, the circuit court could not consider evidence that was not presented to the hearing officer. Further, the circuit court's reliance on *Roman v Secretary of State*, 213 Mich App 592; 540 NW2d 474 (1995), was misplaced inasmuch as that case did *not* hold that a circuit court may rely on evidence outside of the administrative record in reviewing the decision of the DLAD. Rather, this Court in *Roman* held that the circuit court erred in reviewing the decision of the DLAD without the record of the administrative hearing or the petitioner's driving record. *Id.* at 596.

Consequently, the circuit court erred as a matter of law in determining that its review was not limited to the administrative record compiled before the DLAD hearing officer and in considering evidence beyond both the hearing record or the driving record.

Respondent also argues that the circuit court clearly erred in finding that the hearing officer's decision was not supported by competent, material, and substantial evidence and in finding that the decision was arbitrary, capricious, and an unwarranted exercise of discretion. When reviewing a lower court's review of an administrative agency, this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the administrative agency's factual findings. *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). This latter standard is the same as the clearly erroneous standard of review. *Id.*

The DLAD's decision was guided by the administrative rule, 1992 AACRS, R 257.313, which sets forth the standards for license revocations under MCL 257.303(2)(f). R 257.313 requires the petitioner to rebut by clear and convincing evidence the presumption of MCL 257.303 that petitioner should not be granted a license. Evidence relevant to the rebuttal includes:

- (i) That the petitioner's alcohol or substance abuse problems, if any, are under control and likely to remain under control.
- (ii) That the petitioner represents a low or minimal risk of repeating his or her past abusive behaviors.
- (iii) That the petitioner represents a low or minimal risk of repeating the act of operating a motor vehicle while impaired by, or under the influence of, alcohol . . .
- (iv) That the petitioner has the ability and motivation to drive safely and within the law.
- (v) Such other showings as are relevant to the issues identified in paragraphs (i) to (iv) of this subdivision. [1992 AACRS, R 257.313(1)(a).]

Additionally, petitioner must prove by clear and convincing evidence that he has completely abstained from the use of alcohol and controlled substances for a minimum period of six months. More than six months of abstinence may be required if, as in this case, the evidence shows that petitioner has three or more convictions of alcohol-related offenses, petitioner has suffered relapses after trying to bring his substance abuse problem under control, or an alcohol abuse evaluation of petitioner reveals a diagnosis of alcohol abuse or dependency. 1992 AACRS, R 257.313(1)(b).

MCL 257.323(4) provides the circuit court's reviewing role of the DLAD's decision:

The court shall set aside the secretary of state's determination only if the petitioner's substantial rights have been prejudiced because the determination is any of the following:

(a) In violation of the Constitution of the United States, the state constitution of 1963, or a statute.

(b) In excess of the secretary of state's statutory authority or jurisdiction.

(c) Made upon unlawful procedure resulting in material prejudice to the petitioner.

(d) Not supported by competent, material, and substantial evidence on the whole record.

(e) Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law.

The circuit court found that the DLAD's decision was not supported by competent, material, and substantial evidence on the whole record and was an arbitrary, capricious, and clearly unwarranted exercise of discretion. We disagree on both points and reverse the circuit court. We emphasize that "even if the circuit court would have arrived at a contrary conclusion if it had been in the hearing referee's place, the court was nonetheless bound to affirm the [hearing officer's] decision as long as the decision was sufficiently supported." *Michigan Educ Ass'n Political Action Committee v Secretary of State*, 241 Mich App 432, 445-446; 616 NW2d 234 (2000).

In the present case, the hearing officer's findings are clearly supported by competent, material, and substantial evidence on the whole record. The findings by the hearing officer that petitioner had previously relapsed after a year of sobriety and that he could not state any of the AA steps to recovery are both relevant to and evidence of meaningful participation in recovery programs and his risk of repeating past alcoholic behaviors. The hearing officer further based his determination that petitioner failed to meet his burden of proof by clear and convincing evidence on the following evidence: petitioner had been diagnosed as an alcoholic; he had admittedly consumed significant amounts of alcohol on a daily basis for about thirty years; he had relapsed in 1993 after a year of sobriety and continued to drink until an episode of life-threatening alcohol poisoning in 1997; and he could not verbalize any of the AA principles despite assertedly attending AA meetings three times a week. In reviewing the determination by the DLAD hearing officer, we also cannot conclude that this decision was in any way arbitrary, capricious, or an unwarranted abuse of discretion.

Reversed and remanded for reinstatement of the administrative decision. Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Jessica R. Cooper